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APPENDIX

In The

Supreme Court of the United States

October Term, 1970

~~No. 1025~~ 70-77

STATE OF NORTH CAROLINA,

Petitioner

v.

WAYNE CLAUDE RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
Filed February 8, 1971
Certiorari Granted April 5, 1971

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In The

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October Term, 1970

NO. 1325

STATE OF NORTH CAROLINA,

Petitioner

v.

WAYNE CLAUDE RICE,

Respondent.

RELEVANT DOCKET ENTRIES

(1) July 2, 1968. Wayne Claude Rice was arrested on a charge of driving under the influence of alcohol.

(2) July 19, 1968. Wayne Claude Rice was tried upon the charge of driving under the influence of alcohol in the Buncombe County General Court (Asheville), North Carolina. Upon a finding of guilty, he was sentenced to a term of 9 months imprisonment, suspended upon payment of a fine of $100.00 and cost. Thereupon, Rice appealed to the Buncombe County Superior Court for a jury trial *de novo*.

(3) August 2, 1968. Wayne Claude Rice was afforded a jury trial *de novo* in the Buncombe County Superior Court before the Honorable Francis O. Clarkson, Judge of the Superior Court of North Carolina, and a jury. Upon conviction by the jury upon the charge of driving under the influence of alcohol, Rice was sentenced to a term of 2 years imprisonment.

(4) August 2, 1968. Upon appeal for jury trial *de novo* in the Buncombe County Superior Court, Wayne Rice plead guilty to 12 charges of uttering worthless checks,

and was sentenced by the Honorable Francis O. Clarkson, Judge of the Superior Court of North Carolina, to 12 consecutive 30-day terms of imprisonment. (These sentences ran concurrently with the sentence imposed for driving under the influence of alcohol.)

(5) September 6, 1968. Petition for post conviction hearing filed in the Buncombe County Superior Court.

(6) October 30, 1968. Wayne Claude Rice was provided a post conviction hearing pursuant to the provisions of the North Carolina Post Conviction Hearing Act, in the Buncombe County Superior Court, before the Honorable W. K. McLean, Judge Presiding. Rice was represented by Dennis Winner, Esquire, court-appointed counsel. By Order dated October 30, 1968, Judge McLean denied post conviction relief and the appointment of Dennis Winner, Esquire, court-appointed consel, was continued in order to file a Petition for Writ of Certiorari to the North Carolina Court of Appeals seeking to review Judge McLean's Order denying post conviction relief.

(7) November 22, 1968. Wayne Claude Rice withdraws his Petition for Writ of Certiorari to the North Carolina Court of Appeals.

(8) November 25, 1968. Wayne Claude Rice escapes from the custody of the North Carolina Department of Correction and remains on escape until captured on November 27, 1968.

(9) December 6, 1968. Wayne Claude Rice is convicted of escape in the Buncombe County General Court and sentenced to a term of 4 months imprisonment to commence at the expiration of the sentences imposed for driving under the influence of alcohol and upon the 12 charges of uttering worthless checks.

(10) December 11, 1968. Application for Writ of Habeas Corpus filed in the United States District Court for the Western District of North Carolina—Asheville Division.

WAYNE CLAUDE RICE v. STATE OF NORTH CAROLINA, No. 2995 (W.D. N.C., December 11, 1968).

(11) December 24, 1968. Memorandum and Order filed by the Honorable Woodrow W. Jones, Chief Judge of the United States District Court for the Western District of North Carolina, dismissing the Application for Writ of Habeas Corpus due to the Petitioner's failure to have exhausted available State remedies and upon the further ground that the Application asserted no claim upon which relief could be granted.

(12) January 6, 1969. Notice of Appeal filed in the United States District Court for the Western District of North Carolina seeking review of Judge Jones' Memorandum and Order filed December 24, 1968, denying habeas corpus relief.

(13) December 8, 1969. Certificate of Probable Cause entered by the Honorable John D. Butzner, Jr., Judge of the United States Court of Appeals for the Fourth Circuit.

(14) December 10, 1969. Wayne Claude Rice completes the service of the sentence imposed in the Buncombe County Superior Court upon conviction of driving under the influence of alcohol and commences service of the sentence imposed December 6, 1968, upon conviction of escape in the Buncombe County General Court.

(15) January 24, 1970. Wayne Claude Rice is released from the custody of the North Carolina Department of Correction having completed the service of the sentence imposed for escape and having previously completed the service of all other sentences upon which he had been committed to the North Carolina Department of Correction.

(16) May 8, 1970. Oral arguments heard in the United States Court of Appeals for the Fourth Circuit.

(17) November 16, 1970. Opinion of the United States Court of Appeals for the Fourth Circuit filed in the case of WAYNE CLAUDE RICE v. STATE OF NORTH CAROLINA. No. 13,425 (434 F. 2d 297).

(18) November 24, 1970. Order entered by the United States Court of Appeals for the Fourth Circuit staying mandate in the case of WAYNE CLAUDE RICE v. STATE OF NORTH CAROLINA, No. 13,425 (434 F. 2d 297).

(19) February 8, 1971. Petition for Writ of Certiorari filed in the Supreme Court of the United States by the State of North Carolina in STATE OF NORTH CAROLINA v. WAYNE CLAUDE RICE, No. 1325. October Term, 1970.

(20) April 5, 1971. Petition for Writ of Certiorari granted by the Supreme Court of the United States in STATE OF NORTH CAROLINA v. WAYNE CLAUDE RICE, No. 1325, October Term, 1970.

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE SUPERIOR COURT

STATE	)	
	)	
vs.	)	ORDER
	)	
WAYNE CLAUDE RICE	)	

THIS CAUSE coming on to be heard, and being heard, before the undersigned, Judge Presiding, upon a Petition heretofore filed for a Writ of Review, and it appearing to the Court that the defendant has asked that the sentence imposed by the Superior Court be vacated and that in its place the sentence imposed by the General County Court be put into effect, on the theory that that was the maximum the Superior Court could give under the circumstances;

And it appearing to the Court that the defendant was tried in the General County Court of Buncombe County, North Carolina, on the 19th day of July, 1968, upon a charge of operating a motor vehicle upon one of the public highways of this state while under the influence of intoxicating liquors, was found guilty and thereafter the following sentence or Judgment was pronounced:

> "That the defendant be confined in the State Department of Corrections for 9 months; said prison sentence suspended for a period of two years upon condition the defendant violate none of the criminal laws of the State or Federal Government; that he not operate a motor vehicle upon the public highways of the State of North Carolina for at least twelve months or while his license are suspended or revoked; that he surrender his operators license to the Clerk for suspension—pursuant to statute and pay a fine of $100.00 and the cost."

That the defendant gave notice of appeal to the Superior Court of Buncombe County and thereafter, to-wit: on the 2nd day of August, 1968, the defendant was tried before a jury in the Superior Court of Buncombe County, North Caro-

lina, was convicted and the following Judgment was pronounced by His Honor, Francis O. Clarkson:

> "It is the Judgment of the Court that the defendant be confined in the North Carolina Department of Corrections for a period of two years."

Upon the foregoing the defendant contends as a matter of law that the Superior Court could not sentence a defendant to a longer period of time or to a larger fine than was given in the General County Court of Buncombe County, but could only pronounce an identical sentence or a lesser sentence.

It is the opinion of the Presiding Judge upon this hearing that the Superior Court of Buncombe County was not bound by the Judgment of the General County Court of Buncombe County, North Carolina, and that the defendant is not entitled to have the Judgment of Judge Clarkson stricken out and a like Judgment of General County Court pronounced.

IT IS, THEREUPON, ORDERED, ADJUDGED AND DECREED that the petitioner's Writ of Review be denied; that the defendant be returned to the custody of the State Department of Corrections for the completion of his sentence.

This, the 30th day of October, 1968.

/s/ W. K. McLean
JUDGE PRESIDING

To the foregoing Judgment the defendant in apt time, in open Court, gives Notice of Appeal to the Court of Appeals. Further notice waived. Defendant is allowed 60 days within which to make up and serve Case on Appeal, and the Solicitor for the State is allowed 45 days thereafter in which to file Exceptions or serve Counter-Case. Appeal bond in the sum of $100.00 is adjudged sufficient; provided, however, the defendant shall execute an affidavit of his indigency that he may in that event appeal to the Supreme Court or to the Court of Appeals In Forma Pauperis.

It is further considered, order and adjudged that the Honorable Dennis Winner continue as defense counsel in the Case

on Appeal under the Order heretofore entered.

This, the 30th day of October, 1968.

/s/ W. K. McLean
JUDGE PRESIDING

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

CASE NO. 2995

WAYNE CLAUDE RICE, Petitioner.	)	
	)	MEMORANDUM
vs.	)	and
	)	ORDER
STATE OF NORTH CAROLINA, Respondent.	)	

THIS CAUSE coming on to be heard before the undersigned, United States District Judge, and being heard, upon petitioner's application for writ of habeas corpus; and

It appearing to the Court that petitioner alleges he is being unlawfully held in State custody for the following reasons:

1. That petitioner received a greater sentence upon his appeal of a General County Court conviction to the Superior Court.

2. That petitioner was denied his right to be present at his State post-conviction hearing.

In support of his allegations, petitioner asserts that he was arrested on July 2, 1968 on the charge of driving under the influence of alcohol; that he was tried in the General County Court of Buncombe County, North Carolina, on July 14, 1968, at which time he entered a plea of not guilty; that he was found guilty and received a sentence of nine (9) months to be suspended upon payment of a fine of $100 and the costs. Petitioner further asserts that he appealed to the Superior Court of Buncombe County and that on August 2, 1968 he was tried and found guilty by a jury in said Court and that he then received a sentence of two (2) years which he is presently serving. Petitioner further asserts that he was not allowed to be present when his court-appointed counsel presented his case at the State post-conviction hearing.

The petitioner further asserts that after being denied relief at the State post-conviction hearing, he gave notice of appeal but on November 22, 1966 withdrew the same and has not filed a petition for certiorari to the North Carolina Court of Appeals. The Court is of the opinion that inasmuch as all the remedies available in the State Courts have apparently not been exhausted, the doctrine of exhaustion of state remedies requires that this Court not grant the relief requested. Petitioner has not exhausted his State remedies so as to be entitled to seek federal habeas corpus relief. *Ganger v. Peyton*, 379 F. 2d 709 (4th cir. 1967); *Brown v. State of North Carolina*, 341 F. 2d 87 (4th Cir. 1965); *Key v. Holman*, 346 F. 2d 153 (5th Cir. 1965); *Wampler v. Warden*, 224 F. Supp. 37 (1963).

Petitioner has duly filed an application to proceed in forma pauperis and same is hereby allowed.

AND it appearing that petitioner has asserted no claim upon which relief can be granted,

IT IS, THEREFORE, ORDERD that the application for writ of habeas corpus be, and the same is hereby dismissed, and the Clerk is directed to mail a copy of this Memorandum and Order to the petitioner and to the Attorney General of North Carolina.

This, the 23rd day of December, 1968.

Woodrow W. Jones
Chief Judge,
United States District Court

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 13,074

Thurman E. Wood,

Appellant,

v.

Maj. Fred Ross, Supt. of
Caledonia Prison Farm,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., District Judge.

No. 13,425

Wayne Claude Rice,

Appellant,

v.

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, District Judge.

(Argued May 8, 1970 Decided November 16, 1970.)

Before Bryan and Craven, Circuit Judges, and Russell, District Judge.

William W. Van Alstyne (Court-assigned counsel) for Appellants, and Edward L. Eatmen, Jr., Staff Attorney, Office of the Attorney General of North Carolina, (Robert Morgan, Attorney General of North Carolina, and Jacob L. Safron, Staff Attorney, Office of the Attorney General of North Carolina, on brief) for Appellee.

Albert V. Bryan, Circuit Judge:

These are common appeals in habeas corpus aimed at the *ultimate* convictions in North Carolina record courts of Wayne Claude Rice and Thurman E. Wood. They assert that in the review allowed them by the State from their *primary* convictions in courts not of record, each experienced unconstitutional overreaching by the State. Both claim they were denied due process, in that they were given harsher punishments on the appeals than in their initial trials. Additionally, Wood argues that he was put in double jeopardy. In our judgment appellants should prevail.

THE WOOD CASE

Wood pleaded guilty, July 19, 1962, and was given the maximum sentence of two years, in the Recorder's Court of the City of Dunn, North Carolina on a *misdemeanor* charge of breaking and entering *without* intent to commit a felony. N. C. Gen. Stat. 14-54. Wood appealed to the Superior Court as permitted by the organic statutes which also provide for a de novo trial. GS 7-230 and 15-177.1.

At the term commencing in August, 1962, Wood was indicted for the same act by a grand jury, but this time for a *felony*—namely the offense of breaking and entering *with* criminal intent. GS 14-54. Again he pleaded guilty but this time he was

ordered to serve 10 years imprisonment, with five years suspended on probationary conditions. GS 14-2. On October 15, 1965, this grace was forfeited, but on March 15, 1966 the Governor of North Carolina commuted the sentence to five years.

For relief, post-conviction remedies and habeas corpus were pursued in the Superior and Supreme Court of North Carolina on the contention that the due process clause of the Fourteenth Amendment forbids the augmenting of punishment on appeal beyond the penalty imposed at the first trial, citing Patton v. North Carolina, 381 F2d 636, 638-41 (4 Cir. 1967), cert. denied 390 US 905 (1968). Failing in the State tribunals, Wood petitioned the Federal District Court of Eastern North Carolina for release on habeas corpus. In replication, the State contended that *Patton* was distinguishable on the premise that there the appeal was simply a continuation of the first case, while here the second proceeding was a new and different cause.

The District Court refused relief October 17, 1968 and this order is the predicate of the instant appeal. Stout precedent for its view is found in State v. Morris, 275 NC 50, 165 SE2d 245, 252 (1969) and State v. Tolley, 271 NC 459, 156 SE2d 858, 860 (1967). These declare that since in North Carolina the appeal from the inferior to the higher court is de novo, the latter was at liberty to punish to the limit of the statute, unrestricted by the first judgment.

Notwithstanding the force of the decisional law adopted by the District Court, we cannot accept its conclusion that there was no violation of due process in the imposition here of a harsher sentence when the accused exercised his legal right to appeal. The review is a privilege granted by the State and cannot, compatibly with due process, be encumbered.

Our position was first and fundamentally stated in *Patton*, supra, 381 F2d at 638-41. Its logic is not dislodged by terming the second trial here as a totally independent and discrete proceeding. In both trials the misconduct to be punished was

identical. The penalty cannot be expanded merely because of redetermination of guilt.

While North Carolina v. Pearce, 395 US 711 (1969) had not come down at the time of the District Court's decision, its reasoning is now available.[1] There the Court accepted the due process rationale of *Patton*. Nevertheless, the Court modified the *Patton* doctrine that in no event could a sentence be increased on appeal. Instead, the Court concluded that a more stringent sentence on the second trial constitutes withdrawal of Federal due process when there is no proof of intervening detrimental deportment. Id. at 723-26.

The present lack of such proof compels the conclusion that Wood suffered a denial of due process. He was exercising the only avenue afforded to review his conviction. Like the defendants in *Pearce*, Wood had the right to appeal free of the fear of reprisal on the part of the sentencing judge. Id. at 725. No distinction can be drawn between the appellant's right in the two cases.

Wood's appeal irrevocably erased his conviction in the lower court. "'. . . [W]hen appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and *is not thereafter available for any purpose.*' (Emphasis added.) State v. Goff, 205 N.C. 545, 172 S.E. 407." State v. Anderson, 5 NC App. 614, 169 SE2d 38, 39-40 (1969). Hence, Wood could be tried solely on the appeal, but only then with assurance of no enhancement of punishment in the event of another conviction without proof of supervening misconduct. This assurance was violated by the State and so his conviction on appeal as well as his first conviction falls.

Our holding that the State cannot with due process punish

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1. Notably, after oral argument in this case, the Supreme Court of North Carolina held that *Pearce* does not apply to de novo trials resulting from appeals of convictions entered in non-record courts. See State v. Spencer, ____NC____, 173 SE2d 765, 772 (May 13, 1970); State v. Sparrow, ____NC ____, 173 SE2d 897, 903 (May 13, 1970).

Wood on appeal more heavily than he was originally charged, discloses too that he suffered double jeopardy. This is because the charge against him was increased after he had been tried for an offense consisting of an essential element of the greater offense. That is to say, he had been tried for breaking and entering, and then the State tried him for a felony in which breaking and entering was an indispensable element. Cf. Waller v. Florida, 397 US 387 (1970).

The Fifth Amendment, of course, provides "nor shall any person be subject for the *same offense* to be twice put in jeopardy of life or limb", (Accent added.) This prohibition applies to the States. Benton v. Maryland, 395 US 784 (1969). Thus, again, the conviction of Wood is seen to be vitiated. Cf. Price v. Georgia, 398 US 323 (1970); Green v. United States, 355 US 184 (1957); Grafton v. United States, 206 US 333, 350 (1907); Dove v. Peyton, 343 F2d 210, 214 (4 Cir. 1965); Ekberg v. United States, 167 F2d 380, 386 (1 Cir. 1948).

Finally, we note that Wood was released on June 23, 1970 as having completed the five-year sentence. Habeas corpus is thus no longer needed to relieve his detention. Nevertheless, his claims for relief are not mooted. Sibron v. New York, 392 US 40, 55 (1968). He is entitled to a declaration that his convictions were of no effect and preclude consequences which might otherwise result. Hewett v. North Carolina, 415 F2d 1316, 1321-22 (4 Cir. 1969).

Accordingly, we direct issuance of the writ with complete cancellation of the record of his convictions, for the State defeated his right of appeal and it cannot now justly recapture or retry him.

THE RICE CASE

Rice was arrested on July 2, 1968 for driving while intoxicated on a North Carolina State highway. GS 20-138. After trial in the General County Court of Buncombe County on July 19, 1968 upon a plea of not guilty, Rice was convicted and sen-

tenced to imprisonment for nine months, with suspension of execution upon the payment of a fine of $100.00 and costs. On appeal to the Superior Court of the County, he was found guilty and commited to two years imprisonment.

State post-conviction steps failed. He appealed to the North Carolina Court of Appeals, but withdrew his petition and applied to the Federal District Court for Western North Carolina to be discharged on habeas corpus. The argument advanced by Rice there was that the State statute conferred upon him the right of appeal, and that enlargement of the punishment clearly ignored the Federal due process announced in our decision in Patton v. North Carolina, supra, 381 F2d 636.

The District Judge denied the application for habeas corpus on December 23, 1968, for Rice's failure to exhaust his State remedies. The omission was the appeal to the State Court of Appeals. The ruling of the District Court refusing the writ is the subject of this appeal.

We think the District Court was in error in dismissing for Rice's failure to complete the remedies available to him in the State court. It would have been futile. Concededly the Supreme Court of North Carolina had consistently refused to follow *Patton*. State v. Morris, 275 NC 50, 165 SE2d 245 (1969); State v. Stafford, 274 NC 519, 164 SE2d 371 (1968); State v. Tolley, 271 NC 459, 156 SE2d 858 (1967). In these circumstances, exhaustion of State remedies is not indispensable. Hayes v. Boslow, 336 F2d 31, 32 (4 Cir. 1964); cf. Wright v. Maryland Penitentiary, ... F2d ..... (4 Cir. June 23, 1970).

On the merits, we reach the same conclusion as we did in Wood's appeal. While the District Judge went no further than to dismiss the appeal for non-pursuit of State remedies, the grounds for relief still asserted by Rice parallel those of Wood. As in *Wood*, the record reveals nothing which warrants the increased punishment. On the strength of *Pearce*, we again see

the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.

The upshot is that for the reasons stated in *Wood*, except the double jeopardy ground, Rice is not to be held to his conviction. He was completely discharged by North Carolina on January 24, 1970 but this did not moot the case on habeas corpus. Injurious consequences because of the convictions might still obtain. We think Rice is entitled to expunction of the record of them.

In today's decisions, the court is not insensitive to the logical and persuasive argument to the contrary in Lemieux v. Robbins, 414 F2d 353 (1 Cir. 1969), cert. denied 397 US 1017 (1970). Likewise we expresse deference to the opinion in Evans v. City of Richmond, 210 Va. 403, 171 SE2d 247 (1969). We simply disagree.

Reversed with directions.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C.G.S. § 7-195. *Appeal to superior court.*—Any person convicted of any offense of which the recorder has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the recorder, in the same manner as is now provided for appeals from courts of justices of the peace. Upon such appeal the defendant shall be required to give bond or recognizance with sufficient surety for his appearance at the next term of the superior court; and in default thereof the recorder shall commit him to the county jail of the county until he shall give bond or be otherwise discharged by law. (1919, c. 277, ss. 5, 9).

N.C.G.S. § 7A-290. *Appeal from district court in criminal cases; notice; appeal bond.*—Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon receiving notice of appeal, the clerk shall transfer the case to the district or superior court criminal docket. Appeal bond may be set by the judge in his discretion.

N.C.G.S. § 15-177. *Appeal from justice, trial de novo.*—The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as afore-

said. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings. (1868-9, c. 178, subc. 4, s. 11.)

N.C.G.S. § 15-177.1. *Appeal from justice of the peace or inferior court; trial anew or de novo.*—In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon. (1947, c. 482.)

N.C.G.S. § 20-179. *Penalty for driving while under the influence of intoxicating liquor or narcotic drugs.*—Every person who is convicted of violating § 20-138, relating to habitual users of narcotic drugs or driving while under the influence of intoxicating liquor or narcotic drugs, shall, for the first offense, be punished by a fine of not less than one hundred dollars ($100.00) or imprisonment for not less than thirty (30) days, or by both such fine and imprisonment, in the discretion of the court. For a second conviction of the same offense, the defendant shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment for not less than six months, or by both such fine and imprisonment, in the discretion of the court. For a third or subsequent conviction of the same offense, the defendant shall be punished by a fine of not less than five hundred dollars ($500.00) or by both such fine and imprisonment in the discretion of the court not to exceed two years. (1937, c. 407, s.)